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May 16, 1996

VIA HAND DELIVERY

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MAY 16 1996
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

Mr. William F. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, NW, Room 222
Washington, DC 20554

Re: Implementation of the Local Competition Provisions in the Telecommunications Act of 1996 (CC Docket No. 96-98)

Dear Mr. Caton:

Transmitted herewith on behalf of GST Telecom, Inc. ("GST"), are an original and twelve (12) copies of its Comments in the above-referenced proceeding. In addition, a paper copy of the Comments is being served on International Transcription Services, and four (4) paper copies and a diskette are being served on Janice Myles of the Common Carrier Bureau.

Also enclosed is an extra copy of this letter and Comments. Please date-stamp the extra copy and return to the undersigned in the envelope provided.

If there are any questions concerning this matter, please contact me.

Very truly yours,

Morton J. Posner

Enclosures

cc: Janice Myles
ITS

rec'd 0+12

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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Local Competition	)	CC Docket No. 96-98
Provisions in the Telecommunications Act	)	
of 1996	)	

COMMENTS OF GST TELECOM, INC.

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Dated: May 16, 1996

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SUMMARY

GST Telecom, Inc. ("GST"), a competitive access provider using state-of-the-art fiber optic transmission networks, urges the Commission to adopt minimum regulatory standards for interconnection and unbundling of network elements. A federal regulatory baseline is necessary for four reasons. First, minimum federal standards will relieve new entrants of some of the burden and expense of participating in separate proceedings in each state to establish such standards, and of monitoring and complying with varying state standards. Second, minimum standards will ensure rapid availability of local competition to the public when incumbent local exchange carriers ("ILECs") are unable to agree with competitive local exchange carriers ("CLECs") on the terms of interconnection or unbundling. Third, minimum "default" standards will discourage entrenched ILECs from delaying local competition for their own benefit while depriving consumers of competitive service. Fourth, minimum standards will afford all carriers the flexibility to adapt interconnection to technologies that may not be contemplated at this time.

In GST's view, Congress deliberately distinguished between ILECs and other LECs. It chose to impose certain obligations, such as the provision of interconnection and access to unbundled network elements, only upon ILECs. The Commission should not impose, nor should it allow the states to impose, such obligations upon LECs other than ILECs.

GST supports pricing of interconnection (including collocation) and unbundled network elements at a reasonable estimate of long run incremental cost ("LRIC") to a provider using the most efficient available technology. Such pricing is suggested by the statutory language rejecting rate-based pricing, and will result in efficient competition. To ensure that ILECs do not attempt to

impede entry by providing interconnection and unbundled elements in a way that will disadvantage entrants, GST also favors the promulgation of national service standards, together with penalties for non-compliance.

As the industry moves toward LRIC-based pricing, GST supports interim bill and keep arrangements. GST favors allowing terminating carriers to bill and keep in the short run as it does not believe initial tariff flows will be either heavy or imbalanced. Implementation of a usage-sensitive billing system would only serve an economic any barrier to new entrants, who would bear the burden of developing such systems.

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Implementation of the Local Competition Provisions in the Telecommunications Act of 1996	)))	CC Docket No. 96-98

COMMENTS OF GST TELECOM, INC.

GST Telecom, Inc.("GST"), by its undersigned attorneys, hereby submits its Comments in the above-captioned proceeding. GST, a wholly-owned subsidiary of GST Telecommunications, Inc., was formed to develop, construct and operate alternate access and other telecommunications systems within the United States. Through its operating companies, GST has founded a successful operation of state-of-the-art fiber optic transmission networks in Riverside, San Bernadino, and Ontario, California. In addition, GST currently has "competitive access provider" ("CAP") networks under construction or operational in Arizona, Hawaii, Idaho, New Mexico, and Washington.

I. INTRODUCTION

The Commission established this proceeding to implement the local competition provisions of the Telecommunications Act of 1996 ("1996 Act") and, in particular, to establish regulations as required by Section 251(d)(1). The 1996 Act encourages facilities-based competition in the local exchange market by requiring incumbent local exchange carriers ("ILECs") to interconnect with competitive local exchange carriers ("CLECs"), and make available network elements on an unbundled basis. GST urges the Commission to set minimum national regulatory standards for interconnection and unbundling not only to promote and facilitate local competition, but also to prevent entrenched ILECs from using the regulatory process to delay the introduction of competition.

II. INTERCONNECTION PROVISIONS OF SECTION 251

A. Scope of the Commission's regulations (¶¶ 25-42)

GST supports the Commission's adoption of uniform, pro-competitive national rules for interconnection. Minimum national interconnection standards are imperative for the survival of carriers such as GST. Without minimum national standards, CLECs will experience numerous delays in interconnection at the state level as states and municipalities grapple with interpreting the 1996 Act. Entrenched ILECs will capitalize on these opportunities for delay to deny consumers the benefits of competition by seeking to maintain their monopoly position or by providing interconnection and unbundled elements at unreasonably high prices. If every state is to craft different interconnection standards from "scratch," potential CLECs will have to devote substantial time and resources to monitoring and participating in state proceedings.[1] This task alone may create a nearly insurmountable economic barrier to entry that is inconsistent with both the letter and the spirit of the 1996 Act. At best, individual state participation will be of varying success. While some states are initiating pro-competitive interconnection arrangements, state-by-state determination of basic interconnection issues will balkanize the introduction of competition in the United States and frustrate the pro-competitive intent of the 1996 Act.

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[1] For example, a GST representative recently devoted four weeks to attending a single California workshop.

Contrary to the concerns stated in ¶ 33, explicit national rules can be adopted without impairing states' authority. Even the most detailed rules that the Commission might adopt in this proceeding would only prescribe minimum *standards* for the ILECs in providing interconnection and related arrangements, and could not possibly prescribe specific *outcomes* (such as specific rates for particular unbundled rate elements). States would still have considerable flexibility, as contemplated by §§ 251(d)(3) and 252(e)(3), to apply their own policies and consider local conditions in reviewing specific inter-carrier agreements within the framework established by the Commission's implementing rules, and certainly should be able to exceed the Commission's minimum requirements as long as their decisions remain consistent with the Act.

B. Obligations Imposed by Section 251(c) (¶ 45)

While the Commission may act under § 251(h)(2) to treat any LEC as the incumbent LEC if the LEC has substantially replaced the incumbent, § 251(h)(2) should not be interpreted as authorization uniformly to apply the obligations applicable to ILECs. This conclusion is buttressed by the structure of the statute itself in two respects. First, Congress specifically distinguished the duties imposed on (1) all telecommunications carriers, (2) LECs and (3) ILECs, respectively, in § 251(a), 251(b) and 251(c). Effect must be given to Congress' express intention to differentiate among the three categories. Second, enactment of § 251(h)(2) would be unnecessary if Congress intended that states apply the obligations of ILECs to all LECs. Basic principles of statutory construction demand that the statute not be read to render any portion null.[2] In addition, at this time it is implausible that any LEC other than an ILEC would have market power necessitating imposition of the same competitive safeguards as should be imposed on incumbents.

1. Duty to negotiate in good faith (¶¶ 46-48)

GST strongly supports the adoption of specific rules to implement the "good faith" negotiation requirements of § 251(c)(1). Without specific guidelines from the Commission, this statutory provision will be rendered almost meaningless, since any party acting in bad faith would undoubtedly deny that it was doing so. Negotiators and arbitrators should be able to focus on the substantive issues at hand without having to divert resources to litigating issues of good faith.

As noted in ¶. 46, both the Commission and the courts have provided some guidance on the elements of "good faith" negotiation. In addition to issues arising under the 1996 Act, courts have interpreted "good faith" in other contexts, especially in labor relations law. "Good faith" is an inherently subjective standard, since it depends upon a party's state of mind, but past decisions have identified some objective indicia of good faith. For instance, parties must appoint qualified representatives who have authority to bargain.[3] The negotiators do not necessarily have to have final authority to enter into an agreement, but they must "be given authority to discuss freely contract

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[2] *See United States v. Menasche*, 348 U.S. 528, 538-39 (1995).

[3] *FCC Asks for Comments Regarding the Establishment of an Advisory Committee to Negotiate Proposed Regulations*, Public Notice, CC Docket No. 92-76, 7 FCC Rcd. 2370, 2372, para. 16 (1992); *see also Southern Pacific Communications Co. v. American Tel. & Tel. Co.*, 556 F. Supp. 825, 1006 (D.D.C. 1983), *aff'd*, 740 F.2d 1011 (D.C. Cir. 1984).

proposals and counter-proposals, enter into tentative compromises or agreements and provide clarification and limitation of disputed issues."[4] Failing to respond to a request for good-faith negotiations within a reasonable time or imposing unreasonable conditions as prerequisites to negotiation may be considered evidence of bad faith.[5] In this instance, GST believes that insisting on broad non-disclosure agreements should be considered *prima facie* evidence of bad faith. An ILEC (or, for that matter, a new entrant) may reasonably insist on protection of particular items of confidential information (such as the location or capacity of specific network elements, or competitively-sensitive cost information) disclosed during negotiations; but it is not reasonable to demand that all information concerning negotiations and positions taken (including, in some instances, the fact that negotiations are taking place at all) be kept confidential. The 1996 Act itself establishes a presumption against secret negotiations by requiring public disclosure of agreements in Section 252(h).

In labor law, certain subjects (such as wages and hours) are designated as "mandatory subjects of bargaining."[6] Employers cannot refuse to discuss mandatory topics either directly,

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[4] *Applications of Gross Telecasting,* Docket No. 20014, 92 FCC 2d 250, ¶ 109 (citing *Gulf States Canners*, 224 NLRB No. 215 (1976) and *Great Western Broadcasting Corp.*, 139 NLRB No. 11 (1962)).

[5] *Amendment of Rules and Policies Governing the Attachment of Cable Television Hardware to Utility Poles*, Memorandum Opinion and Order on Reconsideration, 4 FCC Rcd. 468, ¶ 39 (1989).

[6] *NLRB v. Katz,* 369 U.S. 736, 743 (1962).

through an outright refusal, or indirectly, by engaging in so-called "surface bargaining."[7] Section 251(c)(1), by requiring ILECs to negotiate with respect to the duties set forth in subsections (b) and (c), appears to have created similar "mandatory subjects of bargaining" for these carriers. Therefore, just as in the case of employers under the National Labor Relations Act, ILECs have a duty to bargain substantively, not merely to engage in discussions with no real intention of reaching agreement.[8]

As a general matter, failure to produce "reasonable proof" to substantiate claims of "economic inability" to grant concessions requested during negotiations is considered evidence of bad faith.[9] In the context of the 1996 Act, this rule suggests that if an ILEC claims in negotiations that a proposed rate is inconsistent with the pricing standards set forth in § 252(d), it should be prepared to present cost data to substantiate its position, at least if that data can be obtained without undue burden. Likewise, a party claiming that a request for interconnection, unbundled access, or

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[7] For example, one court found the employer's duty to bargain in good faith violated by its insistence on certain wage proposals because "the Company's unalterable position was that it remain in total control of this mandatory subject of bargaining." *NLRB v. A-1 King Size Sandwiches, Inc.*, 732 F.2d 872, 875 (11th Cir. 1984).

[8] "[A]s has been long recognized, performance of the duty to bargain requires more than a willingness to enter upon a sterile discussion of union-management differences." *NLRB v. American National Insurance*, 343 U.S. 395, 402 (1952). In labor cases, the courts consider whether "the content of the [employer's] bargaining proposals together with the positions taken by the [employer] are sufficient to establish that it entered into bargaining with no real intention of concluding a collective bargaining agreement." *NLRB v. A-1 King Size Sandwiches, Inc.*, 732 F.2d at 874.

[9] *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 152-53 (1956). A party's duty to prove its claims may be limited, however, by the burden it would face in providing such proof. *Id.* at 151.

a similar arrangement is technically infeasible or otherwise unreasonable should be required to provide reasonable documented proof containing detailed technical justification for such assertions.

The Commission seeks comment in ¶ 48 on whether §§ 252(a)(1) and 252(e)(1) require parties with existing agreements relating to duties contained in §§ 251(b) and 251(c) to submit those agreements to state commissions for approval. The language of the 1996 Act provides the answer. Such interconnection agreements negotiated before enactment of the 1996 "shall" be submitted to state commissions. State commissions may only reject such agreements in very limited circumstances delineated in § 251(e)(2). Further, such pre-existing agreements must be made generally available pursuant to § 252(i). The Commission also seeks comment on whether § 252 permits renegotiation of such pre-enactment agreements. As a threshold matter, §§ 251(c)(1) and 252 apply only when an ILEC receives a request to negotiate from another carrier. Thus, renegotiation is permissible if, and only if, it is initiated by a party other than an ILEC. Against that background, the 1996 Act makes dramatic changes in the legal rights and obligations in the local exchange competition marketplace. Consistent with other instances in which the Commission has ordered a "fresh look" policy with respect to contracts executed in a different regulatory environment, any carrier that entered into a pre-enactment agreement with an ILEC must be entitled to request new arrangements pursuant to § 252.[10]

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[10] *See, e.g., Expanded Interconnection with Local Telephone Company Facilities,* 9 FCC Rcd 5154, 5207-10 (1994) ("fresh look" available to LEC customers who wish to sign with competitive access providers); *Competition in the Interstate Interexchange Marketplace,* 7 FCC Rcd 2677, 2681-82 (1992) ("fresh look" in context of 800 bundling with interexchange offerings); *Amendment of the*
(continued...)

2. Interconnection, collocation, and unbundled elements (¶¶ 49-171)

a. Interconnection (¶¶ 49-65)

GST supports the Commission's tentative conclusion in ¶ 50 to adopt explicit minimum national interconnection standards. If the Commission's rules establish one or more minimum acceptable "default" interconnection configurations with ILECs, states will retain the flexibility to consider other alternatives for interconnection or state-specific issues. Establishment of minimum interconnection criteria will expedite state proceedings and will assist in preventing ILECs from erecting barriers to entry.

Relationship between interconnection and transport termination (¶¶ 53-54)

The Commission seeks comment in ¶¶ 53-54 on the relationship between Section 251(c)(2) "interconnection" and § 251(b)(5) "transport and termination." These are discrete concepts; however, their ultimate goal should be one and the same. § 251(c)(2)(A) specifically requires ILECs to provide "interconnection . . . for the transmission and routing of telephone exchange service and exchange access." § 251(b)(5) requires all LECS to enter into "reciprocal compensation arrangements for the transport and termination of telecommunications." This distinction leads to the conclusion that Congress meant to differentiate between the physical and technical arrangements required to establish connections between two networks (interconnection) and the financial

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[10](...continued)
Commission's Rules Relative to Allocation of the 849-851/894-896 MHz Bands, 6 FCC Rcd 4582, 4583-84 (1991) ("fresh look" imposed as condition of grant of licenses under Title III of Communications Act).

arrangements for carriage of traffic over the connected networks (reciprocal compensation). Accordingly, § 251(c)(2) should be construed as referring to the physical facilities and equipment that link networks, not to the termination of traffic on those facilities. With long run incremental cost ("LRIC")-based pricing, which is discussed below, transport and termination of traffic over interconnected facilities should aim to reflect true cost to achieve the most technically and economically efficient network.

Technically feasible interconnection point ¶¶ 56-59

Section 251(c)(2)(B) requires interconnection at any technically feasible point within a carrier's network. The Commission asks for comment at ¶ 56-59 on what these technically feasible points are. As a technical matter, interconnection can occur at any point at which two carriers have access and where suitable transmission facilities are present to permit the routing of traffic to and from another network. As a practical matter, interconnection can occur at a point upon which any two parties can agree. GST agrees with the Commission that a party alleging that interconnection at a particular point would risk harm to the network or be technically infeasible must present specific and detailed technical justification to support its claim. State commissions should be able to prescribe preferred locations for interconnection for default purposes. Such a regime would ensure rapid interconnection without delays inherent in the arbitration process. A minimum technical "floor" of interconnection, such as the points identified by the Commission in ¶ 57,[11/] would still

[11/] GST notes that interconnection at the ILEC's end office should enable a CLEC to offer a competitive tandem service, as was the subject of Docket 91-141. This would inject needed (continued...)

afford parties the flexibility to determine at some later time, whether through arbitration or otherwise, an agreeable interconnection arrangement. In any case, interconnection should occur at a location which affords CLECs the same opportunities for network redundancy and reliability as ILECs. Moreover, interconnection would be subject to the same technical standards ILECs have with each other, including industry norms. These standards should be reciprocal and enforceable with respect to ordering, testing, and provisioning intervals. Interconnection also should allow for the exchange of all types of traffic consistent with that carried by the ILEC.

The Commission should establish national minimum standards for just, reasonable, and nondiscriminatory terms of interconnection, which should include such matters as service provisioning intervals, maintenance standards, repair obligations, and joint traffic planning to ensure adequate interconnection capacity. Requesting carriers should have a swift and certain remedy for violation of these standards by an ILEC, such as compensatory damages for failure to install circuits or facilities within a defined installation interval (although any such relief should not preclude the injured party from pursuing any other remedies available to it). In addition, the parties to an agreement should designate which portions of §§ 251 and 252 the agreement includes. In this way, state commissions, courts, and the parties will not get mired in litigating seemingly uncontested issues which would delay further negotiations.

[11/](...continued)
competition into the market for local transport of interexchange traffic.

The requirement that the ILEC provide interconnection that is "at least equal in quality to that provided by the [ILEC] to itself . . . or to any other party to which the carrier provides interconnection," § 251(c)(2)(C), serves to reinforce the more general requirement of non-discrimination in § 251(c)(2)(D). Traffic exchange facilities between an ILEC and a competitor should be designed to meet at least the same technical criteria and grade-of-service standards (*e.g.*, busy hour probability of blocking) as the inter-office trunks used within the ILEC's network. Moreover, if the ILEC provides a higher grade of service to "any other party," such as a non-competing ILEC serving a neighboring territory, it must provide comparable interconnection to competitors. The Commission should specifically require that ILECs enter into two-way trunking arrangements, tandem subtending and transiting arrangements (using either an ILEC or CLEC service), and meet-point billing arrangements with competitors if they have entered into such arrangements with "any other party," including neighboring non-competing ILECs.

GST agrees with the tentative conclusion in ¶ 65 that the Commission can (and should) require LECs to offer a variety of forms of interconnection, including virtual collocation and meet-point arrangements, in addition to physical collocation. Section 251(c)(6) requires ILECs to offer physical collocation "of equipment necessary for interconnection or access to unbundled networks[.]" Thus, Congress identified physical collocation as a particular means of achieving interconnection or access to unbundled elements, but not the exclusive means (because, if it were the exclusive means, then subsections (c)(2) and (c)(3) would not have been required). In interpreting this provision, the Commission must bear in mind the circumstances under which

Congress acted. In 1992, the Commission adopted rules requiring physical collocation, which were vacated by the United States Court of Appeals on the specific ground that the Commission lacked statutory authority, under the Act as then in effect, to compel physical collocation.[12/] Congress undoubtedly realized that an explicit reference to physical collocation in the 1996 Act was necessary to overrule the *Bell Atlantic* decision and to provide the Commission with the authority that had previously been lacking. Under these circumstances, no inference can reasonably be drawn that Congress intended any limitation on the Commission's authority to require forms of interconnection other than physical collocation (especially in light of § 251(i)).

Because §§ 251(c)(2) and 251(c)(3) require ILECs to provide interconnection and access to unbundled network elements "at any technically feasible point," it is reasonable to infer that the party requesting these arrangements is entitled to specify the place and type of interconnection that it desires, and that the ILEC has an obligation to honor this request unless it can demonstrate that doing so would be technically infeasible. The Commission therefore need not attempt to specify a comprehensive list of permissible types of interconnection (although, at a minimum, physical collocation must be available, and virtual collocation and meet point options should also be required).

b. Collocation (¶¶ 66-73)

GST believes that CLECs would prefer to be assured of the opportunity of physical collocation at a LEC central office. With the multiplicity of carriers providing local service,

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12/ *Bell Atlantic Tel. Cos. v. FCC*, 24 F.3d 1441 (D.C. Cir. 1994).

however, physical collocation will not always be possible. In reality, some combination of physical and virtual collocation will be necessary in many central offices. At a minimum, the Commission should require that CLECs may elect physical collocation when and where it is technically possible to provide it. Charges for virtual collocation, where it occurs, should be no more than for physical collocation. Conversion of virtual to physical collocation should be subject to a simple one dollar leaseback option. ILECs must not be allowed arbitrarily to deny collocation of certain types of CLEC hardware (e.g., access nodes). If equipment passes industry standards and requirements (such as ANSI, Bellcore, etc.), the CLEC must not be denied the opportunity to place the equipment.[13/]

GST recommends that the Commission establish specific, unambiguous collocation pricing standards and require that the ILECs file tariffs that reflect those pricing standards. Specifically, GST suggests the following pricing standards:

- **Nondiscriminatory prices**. The 1996 Act requires that collocation prices be nondiscriminatory. Collocation prices should be nondiscriminatory with respect to other collocators, with respect to retail telecommunications services and with respect to comparable functionalities the ILEC uses to configure its own services. ILECs should offer a collocation rate that neither advantages nor disadvantages any competitor. As a practical matter, this means that if ILECs offer a particular collocation rate to one collocator, they must offer the same rate to all who wish to collocate. Nondiscriminatory prices also requires parity between services. One example of

[13/] With respect to the Commission's inquiry in para. 73, GST opposes revision of the expanded interconnection standard for interstate services in this proceeding.

discriminatory prices described by the Commission in the *Expanded Interconnection* proceeding was a $5,592 charge for labor, engineering, and equipment testing levied by Bell Atlantic on collocators when it charged $466.05 for comparable special access services.[14] Nondiscriminatory pricing for collocation also means that ILECs cannot offer collocation to a subsidiary that is more favorable than the collocation offered to a competing firm or the collocation functionalities that the ILEC uses to provision its own services. For example, since collocation accommodations are a fundamental element of the access services that ILECs provide to their customers, a crude discrimination test is that collocation charges should never exceed the tariffed prices for special access circuits.[15] If special access rates cover costs, then the nondiscriminatory price of collocation, which is just a sub-set of the functionality used to provision special access, should be substantially below tariffed special access rates. Likewise, prices for virtual collocation should not exceed the prices for physical collocation since physical collocation should include elements such as area preparation, construction, and design functions that are not included with virtual collocation.[16] Any special security

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14/ *Local Exchange Carriers' Rates, Terms, and Conditions for Expanded Interconnection Through Virtual Collocation for Special Access and Switched Transport*, Order Designating Issues for Investigation, CC Docket 94-97, Phase II, 10 FCC Rcd. 11116, 11121 (1995) ("*Designation Order*").

15/ The ILECs' collocation prices filed in the Expanded Interconnection docket, however, often did exceed their special access rates, which presumably bundled the collocation accommodations with access facilities. See *Ameritech Operating Companies Revisions to Tariff FCC No. 2*, Transmittals 697, 711 *et al.*, Order, CC Docket 93-162, 8 FCC Rcd. 4589, 4592-4593 (1993).

16/ The ILEC virtual collocation prices, however, did exceed their physical collocation prices. See *Local Exchange Carriers' Rates, Terms and Conditions for Expanded Interconnection for Special Access*, Order Designating Issues for Investigation, CC Docket 93-162, 8 FCC Rcd. 6909,
(continued...)

arrangements, such as cages or alarms, should be installed only at the request of the interconnector at cost-based rates.

- **Collocation Charges Should be Set at the Incremental Cost of Collocation.** In describing "just and reasonable" interconnection charges and charges for access to unbundled network elements, the 1996 Act requires that such rates shall be "based on the cost (determined without reference to a rate-of-return or other rate-based proceeding) of providing the interconnection or network element" and "may include a reasonable profit." Section 252(d)(1). The same pricing standard should apply to "just and reasonable" charges for collocation for interconnection and access to unbundled network elements, since collocation is simply one means of providing such interconnection and access. Prices set at incremental costs (which include a return to the capital facilities used to provide the service) meet this statutory standard. Prices designed to provide contribution or produce a particular revenue requirement do not meet this statutory standard. Similarly, collocation charges that differ by jurisdiction (*e.g.*, higher intrastate collocation charges than interstate collocation charges), or differ by state, or differ by zone density, or differ among ILECs where such differences have no basis in costs cannot be considered "just and reasonable" under the 1996 Act.

[16/](...continued)
6910 (1993).

c. Unbundled network elements (¶¶ 74-82)

Section 251(d)(2) directs the Commission to identify a minimum set of network elements that ILECs must unbundle. Specifically, GST recommends that the loop, switching, transport and access to databases be unbundled. Loops should also be available and further unbundled into feeder, distribution, drop, and switch port. A list identifying a minimum set of network elements that must be unbundled must not be understood to preclude a CLEC's request that additional elements be unbundled. There are multiple points in the LEC's subscriber loop which are natural points of interconnection. GST supports a flexible definition of "network element" as suggested in ¶ 83. Such an expansive definition will accommodate future telecommunications networks and technologies. Further, network elements must be defined in terms of network capability, not in terms of particular ILEC services or service elements. The definition in § 3(29) expressly states that a "network element" is a "facility or equipment used in the provision of a telecommunications service" and "includes features, functions, and capabilities that are provided by means of such facility or equipment." Thus, a network element is the underlying facility, equipment, or capability, not limited by the particular use to which the ILEC puts it. For example, in Hawaii, where a GST subsidiary operates, GTE controls an interisland cable which is a bottleneck transport facility between Hawaiian islands. Under the 1996 Act, such a facility represents a discrete network "element" to be unbundled.

Service Intervals (¶ 79)

In ¶ 79, the Commission inquires whether it should establish minimum requirements governing, inter alia, provisioning and service intervals and technical standards. GST believes that such requirements are of great importance. In many cases, ILECs' failures to provide CLECs with unbundled elements on intervals comparable to those they furnish to their own end user customers have handicapped CLECs in their ability to compete. ILECs have every economic incentive to provide CLECs with inferior service. Only regulatorily-imposed standards, with penalties for non-compliance, can offset such incentives. It is appropriate for the Commission to establish such standards and penalties on a national level; CLECs should not have to fight this battle 51 times. At the same time, the existence of minimum standards should not preclude states from imposing more stringent standards. Such minimum standards also should not preclude a state from requiring the ILEC to make available, at the option of the CLEC, an even higher level of service upon payment of an increased rate reflecting the LRIC of provisioning to the higher level.

(1) Network elements (¶¶ 83-85)

The Commission notes in ¶ 85 that § 252(d) provides different pricing mechanisms for resale and for unbundling, and asks whether unbundled elements under § 251(d)(3) may be used by new entrants as "an alternative way to 'resell' the services of ILECs in addition to the specific resale provision in subsection (c)(4)?" GST believes that the adoption of very distinct pricing methodologies for resale and for unbundled network elements makes it clear that Congress did not intend for the access to unbundled network element provisions of §251(c)(3) to serve as a means for non-facilities-based carriers to obtain at a lower price than is available under the resale provisions of § 251(c)(4).

In § 252(d), Congress directed the use of a pricing methodology for resold services in which avoided costs are subtracted from retail rates, but directed that unbundled network elements, by contrast, be priced based upon their cost. Generally, the pricing methodology provided under the resale provision of the 1996 Act should result in somewhat higher prices, because it preserves for the incumbent the contribution inherent in the incumbent's retail rates. This perhaps reflects Congress' view of the limited contribution resellers make to the eventual service offering -- a contribution that generally involves nothing more than the reseller taking over certain of the ILEC's billing and collection, marketing and customer service functions. By contrast, under the unbundling provisions of the 1996 Act, network elements are priced at cost to reflect the contribution of co-carriers that combine their own network elements with the ILEC's unbundled components. The 1996 Act thereby encourages facilities-based competition by reserving the potential for higher margins for those carriers that invest in the local network and construct and operate their own facilities.

An entrant into the local exchange market should not be permitted to use the unbundling provision of the 1996 Act to purchase the *entire* LEC network, piece by piece, overriding the resale pricing methodology established by Congress for non-facilities-based carriers. Such an approach would not only nullify facilities-based competition, but the resale pricing provisions, as well.

Allowing piece-part purchase of the entire LEC network would also eviscerate § 271(e)(1), which forbids joint marketing of long distance and resold local service purchased under § 251(c)(4). If the Commission sanctioned the use of unbundled elements as a substitute for resale, the carrier using such elements could technically be considered a facilities-based carrier not subject to the joint marketing restriction. Thus, AT&T, MCI and Sprint would be able jointly to market long distance service and a resold local service (assembled through purchase of unbundled components), violating congressional intent.

(2) Access to network elements should parallel interconnection standards (¶¶ 86-91)

GST supports the Commission's interpretations and tentative conclusions in ¶¶ 86-87. The standards for access to network elements, including the identification of "technically feasible points" for access, should closely parallel the standards for interconnection. The physical and technical requirements for interconnection and access to network elements are virtually identical. As in the case of interconnection, requesting carriers should be entitled to liquidated damages for an ILEC's failure to comply with installation and service commitments. GST also strongly supports the Commission's tentative conclusion at ¶ 87 that the unbundling of a particular network element by one LEC for a carrier evidences the technical feasibility of providing the same or similar unbundled element in another, similarly structured network elsewhere.

(3) Specific unbundling proposals

(a) Local loops should be unbundled (¶¶ 94-97)

GST strongly supports the Commission's tentative conclusion to require unbundling of the local loop. As correctly noted in ¶ 94, the local loop was specifically identified by Congress, both in the Joint Explanatory Statement and in the text of § 271(c)(2)(B), as a network element that should be unbundled. Although the loop is by no means the only ILEC network element to which competitors will desire unbundled access, it is the most critical one. Because duplication of ILEC loop networks is the most formidable obstacle to entry in the local exchange market, the loop has by far the strongest "bottleneck" characteristics of any element of the ILEC network. The Commission's minimum unbundling policy should therefore focus most intently on the rates, terms, and conditions for access to unbundled loops.

The Commission identifies in ¶¶ 95 and 96 a number of potential technical issues regarding loop unbundling. GST urges the Commission to prescribe certain minimum technical and operational standards to avoid future "complex and resource-intensive" disputes. First, ILECs should be required to provide unbundled access to any available loop facilities in their networks. The ILEC should not be permitted to restrict other carriers to a subset of loop facilities or to dictate the particular type of facilities that can be accessed by other carriers. As the Commission suggests in ¶ 95, a simple requirement that ILECs must "provide at central offices individual transmission links to customer premises regardless of the technology involved" would prove inadequate in practice. In fact, not all ILEC transmission facilities are capable of supporting all services. Some